RHB Bank v L & R Holdings Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–382 OF 2005
ZALEHA ZAHARI, JEFFREY TAN AND SYED AHMAD HELMY JJCA
28 JANUARY 2010

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Banking — Banker and customer — Action by customer against bank — Breach of mandate — Telegraphic transfers with forged endorsements — Plaintiffs/respondents obtained injunction to restrain defendant bank from enforcing charged securities — Whether injunction should be set aside — Whether alleged breach of mandate was bona fide and serious issue to be tried

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Civil Procedure — Injunction — Application to set aside — Injunction to restrain defendant from enforcing charged securities — Whether injunction should be set aside — Whether alleged breach of mandate was bona fide and serious issue to be tried — Balance of convenience — Whether plaintiff's loss could be compensated by damages — Whether greater injustice would be done by grant of injunction than refusal of it

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RHB Bank ('the defendant') had granted its customer, the first plaintiff a credit facility of RM5m. Later, that credit facility was increased with the attendant provision of additional securities in the form of a guarantee from the second plaintiff and charges over other specified securities ('the charged securities'). Although the charged securities were worth about RM67m, the outstanding sum stood at RM18,346,546 ('the outstanding sum'). This outstanding sum was incurred as a result of 105 telegraphic transfers ('the TTs') that amounted to RM4,254,687.51 together with interest. The plaintiffs commenced an action against the defendant bank for a breach of mandate. The crux of the first plaintiff's case was that the defendant had acted on forged applications for telegraphic transfers and authorised the TTs to companies or individuals unrelated to the first plaintiff. The defendant denied all forgery on its part and contended that the alleged forgery, if any, was caused or contributed by the plaintiffs. The plaintiff then applied for and obtained an injunction to restrain the defendant from enforcing the charged securities. However, the injunction was silent as to whether the injunction was interlocutory or permanent. This was the defendant's appeal against the decision granting the injunction. The defendant submitted that the injunction should not have been granted and ought to be set aside. The plaintiffs/respondents raised a preliminary objection that the sealed copy of the order was filed without the leave of the court and that had thus failed to comply with r 18(4)(d) of the Rules of the Court of Appeal 1994 ('RCA'). In determining whether the injunction ought to be set

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aside this court had to consider whether the alleged breach of mandate was a bona fide and serious issue to be tried.

Held, allowing the appeal and setting aside the injunction with costs:

(1) In the present case, the impugned TTs spanned for almost two years and during that time the defendant bank had furnished banking statements to the first plaintiff. This meant that those TTs would have been disclosed in the banking statements had those banking statements been vetted by the first plaintiff. Since, the first plaintiff only reported the matter of forged TTs to the police on 21 March 2003, it brought into issue the fact as to whether the first plaintiff had exercised any vigilance and as to whether it had knowingly or negligently contributed to the forgery (see para 5).

(2) Although there should be no finding on the merits of the claim or any defence to it in this appeal, it would seem clear on the facts there was a serious bona fide issue to be tried. In any case the balance of convenience was not in favour of the grant of the injunction. As the alleged damage was quantifiable it would follow that the defendant a bank would be in a position to pay the damages that could be awarded, whereas the grant of the injunction would strip the defendant of its security without any surety at all. Thus, greater injustice would be done by the grant of the injunction than the refusal of it and it should not have been granted (see para 6).

(3) Although r 18(4)(d) of the RCA required a 'copy of the judgment, decree or order appealed from' to be attached to the memorandum of appeal, this requirement was allayed by the Court of Appeal Practice Direction 1 of 1995 ('the 1995 direction'). According to the 1995 direction, leave was not required to file the documents specified in r 18(4)(d) of the RCA. Further the 1995 direction was untouched by the Court of Appeal Practice Direction 1 of 2008 and hence was still in force at the material time (see paras 11 & 13).

[Bahasa Malaysia summary

RHB Bank ('defendan') telah memberikan pelanggannya, plaintif pertama kemudahan kredit sebanyak RM5 juta. Kemudian, kemudahan kredit tersebut dinaikkan dengan peruntukan iringan sekuriti tambahan di dalam bentuk jaminan daripada plaintif kedua dan caj-caj ke atas sekuriti-sekuriti yang dijelaskan lain ('sekuriti-sekuriti yang dicaj'). Walaupun sekuriti-sekuriti yang dicaj tersebut bernilai sebanyak RM67 juta, jumlah yang belum dijelaskan adalah sebanyak RM18,346,546 ('jumlah yang belum dijelaskan'). Jumlah yang belum dijelaskan ini terjadi akibat 105 pemindahan telegraf ('TT') yang berjumlah sebanyak RM4,254,687.51 bersama faedah. Plaintif-plaintif memulakan tindakan terhadap defendan untuk kemungkiran mandat. Teras

kes plaintif adalah bahawa defendan telah bertindak atas permohonan palsu untuk pemindahan telegraf dan membenarkan TT tersebut kepada syarikat-syarikat atau orang persendirian yang tidak mempunyai hubungan dengan plaintif pertama. Defendan menafikan kesemua pemalsuan oleh pihaknya dan berhujah bahawa pemalsuan yang didakwa, jika terdapat, disebabkan atau disumbangkan oleh plaintif-plaintif. Plaintif kemudiannya memohon dan memperoleh injunksi untuk menghalang defendan daripada menguatkuasakan sekuriti-sekuriti yang dicaj tersebut. Walau bagaimanapun, injunksi tersebut adalah senyap terhadap sama ada injunksi tersebut adalah interlokutari atau kekal. Ini adalah rayuan defendan terhadap keputusan membenarkan injunksi tersebut. Defendan berhujah bahawa injunksi tersebut tidak patut diberikan dan patut diketepikan. Plaintif-plaintif/responden-responden membangkitkan bantahan permulaan bahawa salinan meterai perintah difailkan tanpa kebenaran mahkamah dan bahawa oleh itu gagal untuk mematuhi k 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR'). Di dalam menentukan sama ada injunksi patut diketepikan mahkamah ini patut mempertimbangkan sama ada kemungkiran mandat yang didakwa adalah bona fide dan isu serius yang boleh dibicarakan.

Diputuskan, membenarkan rayuan dan mengenepikan injunksi dengan kos:

(1) Di dalam kes ini, TT yang dipersoalkan menjangkau hampir dua tahun dan pada masa tersebut defendan telah mengemukakan penyata-penyata perbankan kepada plaintif pertama. Ini bermaksud bahawa TT tersebut akan dikemukakan di dalam penyata-penyata perbankan sekiranya penyata-penyata perbankan tersebut disemak oleh plaintif pertama. Memandangkan plaintif pertama hanya melaporkan perkara pemalsuan TT kepada polis pada 21 Mac 2003, ia membangkitkan isu fakta terhadap sama ada plaintif pertama telah menjalankan apa-apa sikap berjaga-jaga dan terhadap sama ada ia mengetahui atau secara cuai menyumbang kepada pemalsuan tersebut (lihat perenggan 5).

(2) Walaupun tidak perlu terdapat dapatan atas merit tuntutan atau apa-apa pembelaan terhadapnya di dalam rayuan ini, adalah jelas atas fakta terdapat isu bona fide yang serius yang boleh dibicarakan. Walau bagaimanapun imbangan kesenangan tidak memihak untuk memberikan injunksi. Memandangkan ganti rugi yang didakwa tersebut boleh dinyatakan kuantitinya oleh itu defendan akan berada dalam kedudukan untuk membayar ganti rugi yang boleh diawardkan, sebaliknya pemberian injunksi akan melucutkan defendan daripada sekuritinya tanpa apa-apa jaminan. Oleh itu, ketidakadilan serius akan terjadi dengan memberikan injunksi daripada menolaknya dan ia tidak patut diberikan (lihat perenggan 6).

(3) Walaupun k 18(4)(d) KMR memerlukan 'copy of the judgment, decree or order appealed from' dilampirkan kepada memorandum rayuan,

keperluan ini dikurangkan oleh Arahan Amalan Mahkamah Rayuan 1 Tahun 1995 ('arahan 1995 tersebut'). Mengikut arahan 1995 tersebut, izin tidak diperlukan untuk memfailkan dokumen-dokumen yang dispesifikasikan di dalam k 18(4)(d) KMR. Selanjutnya arahan 1995 tidak terjejas oleh Arahan Amalan Mahkamah Rayuan 1 Tahun 2008 dan oleh itu masih berkuat kuasa pada masa material (lihat perenggan 11 & 13).]

Notes

For cases on action by customer against banker, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1800–1804.

For cases on application to set aside, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3188–3189.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504, HL (refd)

Herman Ando v Tactland Development Sdn Bhd and other appeals [2009] 6 MLJ 38, CA (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, SC (refd)

New Straits Times Press (M) Bhd, The v Airasia Bhd [1987] 1 MLJ 36, SC (refd)

Legislation referred to

Bills of Exchange Act 1949 s 73A

Rules of the Court of Appeal 1994 rr 18(4), (4)(d), 101

Prem Ramachandran (Kumar Partnership) for the appellant.

Harpal Singh Grewal (AJ Ariffin, Yeo & Harpal) for the respondents.

Jeffrey Tan JCA (delivering judgment of the court):

[1] This is an appeal by the defendant/appellant against the learned judge's order dated 10 March 2005. That order restrained the defendant from enforcing the securities pledged by the plaintiffs to the defendant, but was silent as to whether the injunction was interlocutory or permanent.

[2] The pertinent background facts were as follows. The defendant was a bank. The first plaintiff was a customer of the defendant. The second plaintiff was the guarantor of the account of the first plaintiff. The bank and customer relationship commenced in 1996, with the acceptance by the first plaintiff of a credit facility of RM5m from the defendant. That credit facility was later

increased with the attendant provision of additional securities, which were: (i) the guarantee of the second plaintiff dated 9 July 2001; (ii) a charge over all fixed deposits and credit balances held to the credit of the first plaintiff by the defendant dated 9 July 2001; (iii) an undated letter of set off allowing the defendant to apply all monies held to the credit of the first plaintiff by the defendant in satisfaction of all monies owed by the first plaintiff to the defendant; (iv) an undated memorandum of deposit of fixed deposits allowing the defendant to apply the fixed deposits held to the credit of the first plaintiff towards sums due from the first plaintiff to the defendant; (v) a debenture dated 9 July 2001 of the first plaintiff in favour of the defendant, providing a fixed and floating charge over all the assets of the first plaintiff; (vi) a first party charge of five commercial lots in Wisma Central, Kuala Lumpur; (vii) a first party charge of two industrial lots in the Mukim of Ijok, Kuala Selangor; (viii) a third party charge of a housing lot in Cheras, Selangor; and (ix) a third party charge of a house in Cheras, Selangor, the plaintiffs. Those were the securities that the order restrained the defendant from enforcing.

[3] All parties agreed that those securities were worth in the region of RM67m (see 230AR and p 1 of the written submission of the appellant) while the outstanding sum stood at RM18,346,546 at the material time (see 230AR and p 2 of the written submission of the appellant). That outstanding sum of RM18,346,546 was incurred as a result of 105 telegraphic transfers that amounted to RM4,254,687.51 together with the interest (see 230AR and p 2 of the written submission of the appellant).

[4] The crux of the plaintiffs' claim against the defendant was that the defendant had breached the customer mandate, in that the defendant had acted on forged applications for telegraphic transfers and authorised the aforesaid 105 telegraphic transfers to companies or individuals unrelated to the first plaintiff. It was contended by the plaintiffs that one of the managers of the first plaintiff had forged the signatures of the authorised signatories on all applications for telegraphic transfers. Evidently, the claim against the defendant was not grounded on forgery by the defendant. In any event, the defendant denied all forgery on its part. The defendant contended that forgery, if any, was caused and or contributed by the plaintiffs. The defendant pointed to ss 24 and 73A of the Bills of Exchange Act 1949. On the contrary, the plaintiffs argued that the defendant would have to prove those legal defences at the trial.

[5] It should also have been said that the claim would also have to be proved at the trial. But not all proof could be put on the back burner until the trial. In the application for the injunction, the plaintiff had to establish that there was a bona fide serious issue to be tried (*Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 'and that the balance of convenience laid

in favour of granting the injunction (see *American Cynamid Co v Ethicon Ltd* [1975] AC 396 and *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193)' (*Herman Ando v Tactland Development Sdn Bhd and other appeals* [2009] 6 MLJ 38 per Raus Sharif JCA, as he then was). Given that the sought injunction was issued, it could only be assumed that the court below must have held that there was a bona fide serious issue to be tried. But how true was it that there was a bona fide serious issue to be tried? In one way or another, the alleged breach of mandate would be tried. But an issue is not bona fide and serious just because it will be tried. The issue must be both bona fide and serious in the first place, which in the present case must be viewed from the angle of the following factors and the following law. In the present case, the impugned telegraphic transfers spanned for almost two years, from 23 January 2001 to 28 December 2002. During those two years, the defendant had furnished banking statements to the first plaintiff. Those telegraphic transfers would have been disclosed in the banking statements. Now, had those banking statements been at all vetted by the first plaintiff, it should not seem possible that those 'forged' telegraphic transfers could come to 105 and or could span two years. But given that the first plaintiff only reported the matter of forged telegraphic transfers to the police on 21 March 2003, it must be seriously asked as to whether the first plaintiff had exercise any vigilance or had been negligent, which brings into focus the provisions of s 73A of the Bills of Exchange Act 1949, which provides:

> Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

[6] There should be no finding in this appeal on the merits of the claim or any defence to it (see *The New Straits Times Press (M) Bhd v Airasia Bhd* [1987] 1 MLJ 36). But on the facts, it would not seem clear that there was a bona fide serious issue to be tried. Also, in any case, it would not seem that the balance of convenience was in favour of the grant of the injunction. 'If damages in the measure recoverable at common law would be adequate remedy and the defendants would be in a financial position to them no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage' (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 per Lord Diplock). The alleged damage was quantifiable. The defendant was a bank. The defendant was obviously in a position to pay whatever damages that could be awarded to the plaintiffs. Conversely, it would appear that the grant of the injunction would strip the defendant of its security without any surety to the defendant that the damage caused by the injunction could be undone. Unquestionably, greater injustice

would be done by the grant of the injunction, especially so as the injunction was wider than the alleged interest that it sought to protect, than by the refusal of it. The injunction should not have been granted.

[7] For those reasons, we unanimously allow the appeal, set aside the injunction, and award costs of this appeal to the appellant.

[8] Incidentally, we had, at the onset of arguments, overruled the preliminary objection of the respondent that the sealed copy of the said order was filed without the leave of court, as such leave was not required. That was clearly said by Mohtar Abdullah FCJ in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 at p 427, after His Lordship had carefully traced and examined the following Rules and Practice Directions applicable to the Court of Appeal.

[9] Practice Direction 1 of 1992 reads as follows:

> Di bawah peruntukan Kaedah 62(4)(d) Kaedah-Kaedah Mahkamah Agung 1980, seseorang perayu adalah dikehendaki menyertai satu salinan penghakiman, dekri atau perintah yang dirayu ke dalam rekod rayuan.
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> Sehubungan dengan itu didapati kebanyakan perayu tidak mematuhi peruntukan tersebut dan ini melambatkan penetapan kes-kes rayuan di Mahkamah Rayuan.
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> Untuk menyegerakan prosiding rayuan di Mahkamah Rayuan, sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.
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> Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam mahkamah terbuka. Pihak penentang sewajarnya diberitahu di atas penyerahan ini.

[10] In relation to a memorandum of appeal, r 18(4) of the Rules of the Court of Appeal ('RCA') requires an appellant to attach to such memorandum copies of the proceedings in the High Court, including:

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the judge's notes of the hearing of the cause or matter in which the decision appealed against was given;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to r 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) a copy of the written judgment or grounds of decision of the judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal, provided that if the court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal; and

(f) a copy of the notice of appeal.

[11] Rule 18(4)(d) of the RCA required 'a copy of the judgment, decree or order appealed from' to be attached to the memorandum of appeal. But that requirement of 'a copy' was allayed by Court of Appeal Practice Direction 1 of 1995, which adopted and modified Practice Direction 1 of 1992, which with the modifications reads as follows:

> Di bawah peruntukan Kaedah 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1980, seseorang perayu adalah dikehendaki menyertai satu salinan penghakiman, dekri atau perintah yang dirayu ke dalam rekod rayuan.
>
> Sehubungan dengan itu didapati kebanyakan perayu tidak mematuhi peruntukan tersebut dan ini melambatkan penetapan kes-kes rayuan di Mahkamah Rayuan.
>
> Untuk menyegerakan prosiding rayuan di Mahkamah Rayuan, sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.
>
> Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam mahkamah terbuka. Pihak penentang sewajarnya diberitahu di atas penyerahan ini.

[12] In the case of the documents specified in r 18(4)(d) of the RCA, 'there is clearly no necessity to make an application to make an application for leave to file the supplementary record of appeal' (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* per Mohtar Abdullah FCJ). Leave is not required to file the documents specified in r 18(4)(d) of the RCA. As an alternative to the filing of such a supplementary record of appeal, Court of Appeal Practice Direction 1 of 1995 allows an appellant 'to submit a copy of the judgment, decree or order appealed against on the day of the appeal in open court. The only qualification is the professional ethical requirement of informing the respondent accordingly' (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* per Mohtar Abdullah FCJ).

[13] Practice Direction 1 of 1992, in so far as it is applicable to the Court of Appeal, has since been cancelled by Court of Appeal Practice Direction 1 of

2008 which took effect on 1 August 2008. But Court of Appeal Practice Direction 1 of 1995 was untouched by Court of Appeal Practice Direction 1 of 2008, and hence is still in force.

Appeal allowed and injunction set aside with costs.

Reported by Kohila Nesan